Published May 9, 1894.

Supreme Court Syllabi

7117.

C. H. Mabry vs, Thos. Harp, Administrator of the Estate of Joel Stewart, Deceased.

Error from Cowley County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. Annual crops, like wheat, which are the product of industry and care, sown by the owner of the soil, or his tenant, while growing and immatured, are personal property.

2. Where a person in good faith purchases of a tenant, having a term less than two years, an interest in his lease without the assent of the landlord, such contract is voidable only,—not absolutely void. Such contract with the subsequent assent of the landlord is valid. If he refuses to assent, the sub-tenant cannot, as against his objection, take possession of the premises, or any of the growing crop under the lease.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9503.

The State of Kansas on the Relation of John T. Little, Attorney General vs. The Dodge City, Montezuma & Trinidad Railway Company, et al.

Original Proceeding in Mandamus.

PEREMPTORY WRIT DENIED.

SYLLABUS. BY THE COURT. HORTON, C. J

Where a railway company owning a short line of railroad of twenty-six miles only, is wholly insolvent, and such company has no cars or engines with which to operate it, and no funds or property to be applied for the payment of the expenses of the company or the road, and the use of the road has been abandoned for several months, and the road cannot be operated, except at a great loss, by any corporation or person, not taking into account the repairs of the road and the taxes thereon, the supreme court, having some discretion in the granting of a writ of mandamus will not compel, by a peremptory writ, the railway company to replace or put into repair its track, a part of which has been torn up, as such an order would be useless or futile and of no public benefit.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9506.

E. S. Ralston, Trustee, Ed. F. Burrell, Clerk, and H. J. Gyles, Treasurer, et al. vs. The Dodge City, Montezuma, & Trinidad Railway Company, E. F. Kellogg, Harry Benjamin, et al,

Error from Ford County.

AFFIRMED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. Each organized township in this state is a body politic and corporate, and its proper name may sue and be sued.

2. A township may bring an action in its own proper name, but the trustee or other officers of the township are not the proper plaintiffs in an action intended to be brought by the township, or for the benefit of the township, or in the interest of the people of the township.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL.] Clerk Supreme Court.

9120.

The City of ElDorado vs. C. O. Beardsley.

Appeal from Butler County.

AFFIRMED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. An ordinance of a city prohibiting the sale of intoxicating liquors within the limits of such city, except by persons having a per-sell, as provided for by the laws of laws of the state, is not an ordinance to regulate the sale of intoxicating liquors, but to prohibit the sale thereof.

2. Where a police court of a city has jurisdiction to try and punish a party for the violation of a city ordinance, when the prosecution is for that violation alone, the court has also the power to try and punish a party for the commission of several violations of the same ordinance if united in the same complaint. In such case, punishment for the different violations of the same ordinance is not to be aggregated so as to make a single or entire punishment for all the violations, but the sentence for each violation is to be imposed separately and as for a separate offense.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7034.

A. P. Kelly, and W. E. Kelly, Copartners as The Prairie Lumber Company vs. Benjamin F. Martin.

Error from Finney County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

Where the notice to tak a deposition specifies "that the taking will be adjourned from day to day," it is not error for the notary, before whom the deposition is taken, to adjourn the taking of the depositiyn from day to day, at the instance of the attorney for the party giving the notice, where neither the opposing party, nor his attorney appears at any time before such notary public, and there is no contention that the adjournments were taken for the purpose of annoying the opposing party, or preventing cross-examination, or causing any unnecessary expense or delay.

All the justices concurring.
A true copy.
Attest. C. J. BROWN,
[SEAL] Clerk Supreme Court.

6816.

The Orchard Place Land Company vs. Eugenia A. Brady and the City of Kansas City.

Error from Wyandotte County.

AFFIRMED.

SYLLABUS. BY THE COURT. HORTON, C. J

Where a city, in grading one of its streets, filled up a natural water course, and as a substitute for the water course or channel constructed a small sewer or culvert under the grading or embankment on the street, and with the consent of a land company extended the same several feet upon its private property, and the land company graded up its lots and continued the city sewer or culvert through its own property by joining its sewer or culvert with the city sewer, and subsequently the sewer or culvert of the land company, on account of its negligent construction and maintenance, fell in and obstructed the sewer or culvert built by the city, and thereby caused the overflow of the waters formerly carried off by the natural water course, *Held*, That the land company is liable for the damages caused by such obstruction of the sewer and the overflow of the waters resulting therefrom.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7112.

John P. Freese vs. Edward Scouten, et al.

Error from Kiowa County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. All that is required of an applicant to make an entry and a purchase of a tract of the Osage Indian trust and diminished reserved lands is that he shall have all the qualifications of a pre-emptor; that he shall be an actual settler on the land at the date of his entry, and that he shall make full payment therefor.

2. A mortgagee from an entry man of a tract of Osage Indian trust and diminished reserved lands after final receipt is given, and before the issuance of the patent, takes his mortgage subject to the supervisory power of the commissioner of the general land office of the United States.

3. If the applicant or entryman having all the qualifications of a pre-emptor and being an actual settler on the land at the date of his entry, purchases and pays for a tract of the Osage Indian trust and diminished reserved lands, and after obtaining his final receipt, executes a mortgage to another party upon the land, and then for the express purpose of defrauding the mortgagee, enters into a collusive and fraudulent agreement with a third person to have his lawful entry cancelled and in pursuance thereof a collusive contest is commenced by such other person against the entryman, and by the collusion and fraud of the parties, the United States land officers are imposed upon and a cancellation of the entry is obtained so as to apparently transfer the title and interest of the entryman to such other person; *Held*, That as to the mortgagee, having no notice of the contest or of any of the proceedings, such cancellation, having been obtained by collusion and fraud of the parties thereto, does not bind or conclude him.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9564.

The State of Kansas vs. John Sutton.

Appeal from Reno County,

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

Under section 3, chapter 121, sess. laws of 1871, (parg. 2212, gen. stat. 1889) and section 92 of the act relating to crimes and punishments (parg. 2226, gen. stat. 1889) a person who unlawfully and feloniously receives any goods or property stolen, taken and carried away from a railroad depot, station house, passenger coach, express or freight car, knowing the same to have been s i feloniously stolen from such a place, is guilty of a felony without regard to the value of the goods or property so stolen.

Johnston, J., concurring.
Allen, J., dissenting.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9631.

George D. Hale vs. Oscar Bischoff.

Proceedings in Quo Warranto.

JUDGMENT FOR PLAINTIFF.

SYLLABUS. BY THE COURT. HORTON, C. J

1. Where a statute authorizes the appointment of an official and declares the tenure of the office, and is silent on the point as to the beginning of the first appointee's term the commencement of the official term begins to run from the date of the appointment.

2. The office of city assessor of the city of Topeka, under the statute and the first appointment made by the mayor and city council on February 6, 1882, commenced to run from that date. Each succeeding term of two years followed each other in regular order, the one commencing where the other ended.

3. Where the term of a city official is fixed at two years and a person is appointed to the office for one year only, the appointment is valid for the full statutory period.

4. Where an appointment to an office is made during a vacancy fo a full term, this is in legal effect an appointment to fill the vacancy only.

5. An officer whose official term has expired but who remains in possession of the office, having full control thereof and exercising the functions of the same, is an officer *de facto*, and all of his acts, within the limits of his official power, are valid as respects the public and third persons.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7061.

Boston Loan and Trust Company vs. W. M Organ, A. O. Wharton and John S. Kenyon.

Error from Lyon County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J

1. Mere irregularities in the method of obtaining the vacation of a judgment wrongfully obtained and to which no objections were made will not defeat the order vacating such judgment; nor can the omission of a verification to a pleading be regarded as a fatal defect, where the parties proceeded to trial on the merits, without objection, as though the pleading was verified and the issues properly joined.

2. Pleadings examined, and held, to be sufficient to authorize the trial of the questions submitted to the court, and the evidence found to be sufficient to sustain the decision vacating the judgment and permitting the garnishee to come in and defend against the claim of the plaintiff.

3. The garnishee in the action answered and showed that the land which had been attached as the property of the defendant had been conveyed to the garnishee in payment of a just debt owing to him by the defendant, and that the land when fairly valued was wholly inadequate to discharge the indebtedness. There was an understanding between the garnishee and defendant that if at any time the former could obtain more for the property than the amount of the indebtedness the surplus should be paid to the defendant. Upon the trial it was shown that the debt of the garnishee was bona fide and that the transfer of the real estate in satisfaction of the debt was made in good faith, and the undisputed testimony was that no interest remained in the property beyond what was necessary to satisfy the demand of the garnishee. *Held*, That as a sale of the property under plaintiff's attachment would yield nothing and serve no beneficial purpose, the ruling of the court discharging the garnishee and dissolving the attachment was not error.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7057.

E, S. Robinson vs. R. J. Waddell & Company.

Error from Franklin County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J.

In the absence of an agreement or countervailing equity the proceeds of a mortgage given to secure several notes maturing at different times should be applied to the payment of the notes in the order of their maturity; but where the payee of the notes, who was the mortgagee, sells the notes to another and indorses the two notes first maturing as an additional security and to induce the assignee of the notes and mortgage to purchase them, it was proper for the court, in order to give effect to the purpose of the parties, to decree that the unindorsed notes should have precedence in payment out of the fund derived from the foreclosure and sale of the mortgaged property.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7097.

Joseph T. Patterson vs. Benjamin C. Galusha.

Error from Republic County.

REVERSED.

SYLLABUS. BY THE COURT. JOHNSTON, J.

G., who owned a quarter section of land, conveyed 140 acres of the same to P. in consideration that P. would assume and pay a mortgage indebtedness which existed against the land. Afterward, G. brought an action to recover from P. ten acres of the land or the value of the same, alleging that P. had misrepresented the nature and amount of the indebtedness, and that 130 acres was sufficient consideration for the debt assumed. Upon the testimony in the record it is *Held*, That the parties stood upon an equal footing; that the nature and amount of the debt assumed and the material facts in the transaction were equally within the knowledge of both; and that there was no such deception and fraud on the part of P. as will defeat the conveyance of the land or justify a recovery in favor of G.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7133.

Julius Winkelmeyer Brewing Association vs M. K. Wolff and John Wolff.

Error from Barton County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J

Error cannot be predicated upon the overruling of a motion for a new trial where the record fails to show that such motion was filed within three days after the judgment was rendered.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7118.

Clara N. Sellers, et al. vs. Henry Gay, et al.

Error from Wyandotte County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J

The facts in the present case are found to fall within the decision of Sellers vs. Crossan, recently decided, and following that case it is held that the acts and conduct of the complaining parties estop them from disputing the validity of the mortgages foreclosed in favor of the defendants in error. Sellers vs. Grossan, 52 Kas., ——; 35 Pac. Rep. 205.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9516.

The State of Kansas vs. Morgan A. Stickney.

Error from Nemaha County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J

1. Where a person breaks into a building intending to commit larceny and does every act essential to a burglarious breaking, the mere fact that there was a detective with and apparently assisting him in the commission of the crime will not constitute a defense. State vs. Jansen, 22 Kas., 498.

2. If the entrance to the building was made by the procurement and with the consent of the owner, or by a person acting in his employment, the breaking could not be regarded as burglarious, but the fact that the owner was willing to assist in and facilitate the detection and arrest of the criminal is itself no consent to the commission of the crime.

3. The appellant was arrested and his preliminary examination was held eight days before the trial. Two days before the trial counsel was assigned to him, and on the day preceding the trial he filed an affidavit for a continuance, stating that he had not had sufficient time in which to prepare for trial and setting forth the testimony of an absent witness whose testimony he desired. The state consented that the affidavit for continuance should be read as the deposition of the absent witness, and the court denied the continuance. *Held*, That the denial of the motion was not error.

4. Newly discovered evidence that discredits a witness or which is merely cumulative is not sufficient cause for a new trial.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7053.

The City of Kansas City vs. Emma C. Slangstrom.

Error from Wyandotte County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J

1. While a city has power where it is deemed necessary to divert a stream passing through its limits from its natural course and to confine it to a narrower channel, in doing so it must use reasonable care to prevent injury to others, and if damage results to the owners of private property from its negligence or wrong-doing in this respect it will be liable for the loss.

2. Where two or more parties by their concurrent wrong-doing cause injury to a third person, they are jointly and severally liable, and the injured party may at his option institute an action and recover against one or all of those contributing to the injury.

3. Special findings returned by the jury are to be considered together and if possible are to be so construed as to harmonize them and to uphold the general verdict.

4. The findings examined and held to show that the damages recovered were the result of the concurrent wrong doing of the city, and another party, for the wrong of which either was liable, and that the findings are sufficient to sustain the general verdict and the judgment.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7101.

Laura L. Ferree vs. C. E. Walker, et al.

Error from Wyandotte County.

DISMISSED.

SYLLABUS. BY THE COURT. JOHNSTON J.

1. When the time for making and serving a case-made has elapsed, the judge is without power to extend the time for that purpose or to settle and sign a case which may thereafter be presented.

2. The jurisdiction of the judge to settle and sign a case having been lost by lapse of time, it can not be restored by the agreement of the parties nor by any action which the judge with their consent may take.

3. A statement certified to be correct by the clerk of the district court and which is not a record of the court is not competent proof of the alleged facts therein contained.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7113.

The Gregory Grocery Company vs. Young & Conboy.

Error from Johnson County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J

Failing debtors gave preference to several of their creditors over others by executing mortgages upon their property to satisfy what were shown to be bona fide debts. An unsecured creditor caused an attachment to be levied upon some of the property upon the alleged grounds that the debtors had and were about to dispose of their property for the purpose of defrauding, hindering and delaying their creditors. The district court upon a hearing dissolved the attachment, and it is held upon a review of the testimony that the ruling of the court was not erroneous.

All the judges concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9582.

Charles W. Dutton, County Clerk of Cloud County vs. The Citizens' National Bank of Concordia.

Error from Cloud County.

REVERSED.

SYLLABUS. BY THE COURT. ALLEN, J

1. The word credit as defined in paragraph 6847, of the gen. stat. of 1889, and used in the chapter providing for the assessment and collection of taxes, does not include shares of stock in a national bank, and the owners of such shares have no right to deduct from their assessed value the amount of their debts.

2. The statute of this state which permits debts owing in good faith by any person, company or corporation to be deducted from the gross amount of credits belonging to such person, company or corporation, in listing their property for taxation, when the owners of shares of stock in a national bank are not allowed to deduct their indebtedness from the value of such shares, is not in conflict with section 5219 of the general statutes of the United States, does not operate to tax such shares at a greater rate than other moneyed capital in the hands of individual citizens and is valid; the law providing that all corporate stocks, all moneys secured by judgment, or lien on real estate, all moneys on deposit in any bank, subject to withdrawal on demand, and substantially all moneyed capital of every description invested for profit shall be subject to taxation without deduction of indebtedness.

3. Injunction can not be maintained to prevent the collection of a tax which the plaintiff justly ought to pay, for mere irregularities in the proceeding of the assessor, or other taxing officer.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7116.

Mary Buchtella vs. Frank Stepaneka.

Error from Republic County.

MODIFIED.

SYLLABUS. BY THE COURT. ALLEN, J

1. A fraudulent transaction in which both parties have knowingly participated will neither support a cause of action in favor of the plaintiff, nor a counter claim or judgment for affirmative relief in favor of the defendant.

2. Where parties purposely engage with equal guilt in illegal, immoral or fraudulent dealings, the court leaves them where it finds them, and will not lend its aid to either party.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7120.

Daniel Hennigh and Mary Hennigh vs. Commercial National Bank.

Error from Labette County.

AFFIRMED.

SYLLABUS. BY THE COURT. ALLEN, J

In this case a petition in error was filed in the district court to reverse a judgment of a justice of the peace for error in excluding testimony, but as neither the motion for a new trial, notice of the time of hearing the same, nor the action of the justice of the peace thereon is incorporated in the bill of exceptions, such errors could not be considered, and the district court rightly affirmed the judgment.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

[illegible] 8.

State of Kansas, ex. rel. J. D. Naylor, County Attorney, vs. The Dodge City, Montezuma and Trinidad Railway Company, et al.

Error from Gray County.

REVERSED.

SYLLABUS. BY THE COURT. ALLEN, J

The road bed and superstructure of a railroad built under a charter, obtained in accordance with the laws of the state, is charged, not only in the hands of the original corporation, but of purchasers as well, with the burden of the company's charter obligations and cannot be diverted from the purpose to which it was devoted, nor relieved from this burden without the consent of the state duly expressed by the legislature, or other competent authority.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7127.

Morgan County in the State of Missouri vs John D. McRae.

Error from Linn County.

AFFIRMED.

SYLLABUS. BY THE COURT. ALLEN, J

Sureties on a bond conditioned for the erection in accordance with certain plans and specifications and keeping in repair of bridge abutments, are released from liability by a substantial change in the plans of the work made by the principal, and accepted by the obligee of the bond, without their knowledge or consent

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9528.

The State of Kansas vs. Fred Miller.

Appeal from Douglas County.

AFFIRMED.

SYLLABUS. BY THE COURT. ALLEN, J

1. To constitute the crime of robbery by forcibly taking money from the person of its owner, it is not necessary that violence to the person of the owner should precede the taking of the money, it is sufficient if it be contemporaneous with the taking.

2. Where the court charged in substance that the violence to the person of the owner of the money must have been with intent to rob, and that the money must have been "obtained from the money drawer" in the presence of the owner, by means of force and violence to his person and against his will, *Held*, That under the facts of this case, the word "obtained" fairly expressed the same idea as the word taken, and that no error was committed by the use of the word.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7073.

Noyes Spicer vs. Martin L. Wheeler.

Error from Greenwood County.

REVERSED.

SYLLABUS. BY THE COURT. ALLEN, J

A petition filed under chapter 39, of the laws of 1877, to obtain a sale of lands for delinquent taxes, which does not mention all the lands sought to be sold, either in the title or body of the petition, but refers to an exhibit as attached thereto, and made a part thereof, as containing a description of the lands, but where no exhibit is in fact attached to the petition, but a loose paper indorsed with the title of the case is filed with the clerk, which in fact contains a description of the land, and a statement of the taxes, etc., claimed to be a lien on it, is not sufficient as a basis of jurisdiction for the court to render any judgment for the sale of the lands not described in the petition, and where a judgment is rendered under such a petition, and lands not mentioned in any manner except in the exhibit are sold thereunder, such sale is void, and confers no title on the purchaser.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

6776.

City of Kansas City vs. Eugenia A. Brady et al.

Motion for a re-hearing.

ORDER FOR JUDGMENT SET ASIDE AND NEW TRIAL DIRECTED.

SYLLABUS. BY THE COURT. ALLEN, J

1. The former opinion in this case upon the questions of law involved is adhered to. Horton, C. J., dissenting.

2. Where the answers of the jury to special questions submitted to them are not only inconsistent with the general verdict, but with each other as to material matters no judgment can be entered, but a new trial should be ordered.

Johnston, J. concurring.
A true copy.
Attest: C. J BROWN,
[SEAL] Clerk Supreme Court.

7108.

James Woodman vs. Richard Hunter.

Error from Republic County.

REVERSED.

SYLLABUS. BY THE COURT. ALLEN, J

1. Hearsay testimony alone is not sufficient to uphold a judgment.

2. A mortgagee of personal property who surrenders the note secured, and cancels the mortgage in consideration of the note of a third party, secured by a new mortgage including new and different security, without the knowledge or consent of the original mortgagor, is bound by his own bargain, and cannot thereafter resort to the first mortgage as security for the debt.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7111.

Thomas W. Gaunt vs. K. W. Harkness.

Error from Linn County.

REVERSED.

SYLLABUS. BY THE COURT. ALLEN, J

1. On the trial of an action on a promissory note, where the principle issue is as to the genuineness of the defendant's signature thereto, it is error to permit the defendant to present to plaintiff's witness, who are called to testify as experts, false signatures to notes prepared for the purpose of testing the ability of the witnesses to detect a forgery, and to cross examine such witnesses as to such false signatures, and thereafter to introduce such signatures in evidence, and prove by another witness to the fact that he wrote them himself.

2. The rule that writings to be used as a basis for the comparison of hand writings must be admitted to be genuine by the party against whom they are sought to be used, or at least clearly proven to be so, applies as well to writings used on the cross examination of witnesses as on the direct.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9510.

State of Kansas vs. W. H. Whitmore.

Appeal from Osborne County.

REVERSED.

SYLLABUS. BY THE COURT. ALLEN, J

On the trial of a criminal prosecution for libel the jury after having received the direction of the court, have the right to determine at their discretion, the law and the fact, par. 2149, gen. stat. 1889, and counsel has the right to fairly argue his theory of the law of the case to the jury. State vs. Verry, 36 Kas. 416, and in the course of his argument may read from law books recognized as authorities bearing upon the case, and it is error for the court to deny this right.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7098.

The Chicago Lumber Company vs. Ella Limerick.

Error from Waubaunsee County.

AFFIRMED.

SYLLABUS. BY THE COURT. ALLEN, J

In an action to foreclose a lien claimed for materials furnished to a contractor, under a sub contract, where the plaintiff's account, duly verified, is set up in the petition, and the answer of the owner of the property contains a general denial, and also denies specially any indebtedness from the contractor on account of the materials furnished, and the plaintiff offers evidence in chief to prove that the account has not been paid, and the defendant without objection offers proof that it has been paid, and after such proof objection because payment is not pleaded is first made when a check, by which the payment is claimed to have been made, is offered in evidence, and where the whole case is tried through from first to last as though the principle issue was the question of payment, and the court finds adversely to the plaintiff, such finding will not be disturbed because the pleadings strictly construed do not present an issue of payment.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7058.

The Southern Kansas Railway Company vs. W. W. Painter.

Error from Sumner County.

REVERSED.

SYLLABUS. BY THE COURT. ALLEN, J

1. Where the plaintiff in action to recover damages for personal injuries makes statements on the witness stand concerning matters vital to the case, substantially different from those contained in a deposition which he admits having signed, but denies the entire correctness of, it is error for the court to refuse to permit the defendant to read in evidence those parts of the deposition tending to contradict his testimony, and it is wholly unimportant whether such deposition has been filed with the clerk, or is admissible as a deposition.

2. Declarations of a conductor of another train, made at the time of a similar accident at the same place, and proof of the facts connected with such other accident, are held to have been improperly admitted in this case.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

6779.

Helen A. Berry vs. The Kansas City, Fort Scott & Memphis Railroad Company.

Error from Bourbon County.

Motion for a Re-hearing.

DENIED.

SYLLABUS. PER CURIAM.

Where one or more corporations are consolidated into a new corporation with a new name, and the old corporations go entirely out of existence, if no arrangements are made respecting the property and liabilities of the corporations that cease to exist concerning the debts and obligations of such corporations, the consolidated or new corporation will be answerable for the liabilities of its constituent companies. In such a case, the new corporation succeeds to all the property of the old corporations, and the debts of the old corporations become by implication the obligations of the new corporation.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

IN THE SUPREME COURT OF THE STATE OF KANSAS.

I, C. J. Brown, clerk of the supreme court of the state of Kansas, do hereby certify that the foregoing are true and correct copies of the syllabi of the decisions in the above entitled cases as the same appear on file in my office.

Witness my hand and the seal of the supreme court, this 9th day of May, 1894.

[SEAL] C. J. BROWN,
Clerk Supreme Court.